IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

JAMES UTLEY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Upon Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Utley, through his counsel and attorney, prays this court to issue a Writ of Certiorari to bring up the above entitled cause, as it affects your Petitioner, for review.

Jurisdictional Statement.

Petitioner was indicted on two counts for violation of Title 21, U. S. C. A., Section 174, and Section 2553 (a), Internal Revenue Code, in the District Court of the United States, in and for the Southern District of California, Central Division, by re-indictment,[1] filed September 20, 1939. [R. pp. 1-3.]

[1]See allegations respecting first indictments in Brief Statement of the Facts.

A Demurrer to said Indictment was duly filed and overruled October 2, 1939. [R. pp. 3-7.] The cause was set for trial October 17, 1939; the trial concluded on the 19th day of October, 1939, and on October 20th, 1939, the jury returned a verdict of guilty to each count. [R. pp. 10-12.]

Thereafter, motions for new trial were duly filed [R. pp. 13-25], and on November 6, 1939, motions for new trial were denied and exceptions allowed. [R. p. 26.]

The court thereupon pronounced sentence on Count 1 for one year, eleven months and thirteen days, and for the period of five years on Count 2 of the Indictment, execution of sentence imposed on Count 2 being suspended and defendant placed on probation for five years from and after his release from serving the sentence on Count 1. [R. pp. 27-28.]

Thereafter, on the 9th day of November, 1939, Notice of Appeal to the Circuit Court of Appeals from the judgments and orders aforesaid was duly filed. [R. pp. 29-32.] The appeal was duly perfected and came on for oral argument on Friday, October 18, 1940, before Denham, Matthews and Stephens, Circuit Court Judges, United States Circuit Court of Appeals for the Ninth Circuit. [R. p. 283.]

Thereafter, on October 25, 1940, order directing filing of opinion and record of judgment was duly entered, and opinion and judgment filed and entered on October 25, 1940. [R. pp. 283-289.][2]

The above mentioned Circuit Court of Appeals affirmed the orders and judgments of the court below. Petitioner

[2]For the convenience of this Honorable Court copy of opinion is annexed in the appendix hereof.

now seeks review of the aforesaid proceedings by this Court, upon which jurisdiction to review the same is conferred by *28 U. S. C., Sec. 247*, and authorities in *25 C. J., p. 947, Sec. 309.*

Summary Statement of Matters Involved.

(a) The Circuit Court of Appeals, for the Ninth Circuit, has decided a federal question in conflict with applicable decisions of this Court by necessary intendment,[3] it being contended in said Honorable Court that the judgment rested almost in its entirety on intercepted telephone communications between the Petitioner and another party, contrary to and in violation of the provisos in Title 47, U. S. C. A., Section 605.

(b) The Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter, to-wit, the character, form and context of the Indictment under Constitutional Amendments 5 and 6 failed to inform the accused of the nature of the cause of the accusation in sufficient form to enable Petitioner to make his defense.

(c) The Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter, to-wit, in having authorized two penalties for an alleged single offense, constituting double punishment.

(d) The Circuit Court of Appeals has decided an important question of federal law, which has not been, but

[3]The opinion of the Circuit Court actually fails to reflect the grounds for affirmance of the judgments, the Court virtually declining to review any of the multitudinous assignments of error on purely technical grounds.

should be settled by this Court, to-wit, the right of trial counsel to waive admitted prejudicial error without the accused's actual consent.

(e) The Circuit Court of Appeals has departed from the accepted and judicial course of procedure, which calls for an exercise of this Court's power of supervision, the Circuit Court having declined to recognize obvious prejudicial error and to give protection against an unlawful conviction.[4]

Reasons Relied Upon for the Allowance of the Writ.

(a) Before the Circuit Court of Appeals, for the Ninth Circuit, the Petitioner urged that the case against him rested in its entirety on two intercepted telephone communications between a witness not produced at the trial and this Petitioner, citing as authority for the illegality of said evidence the authorities of this Honorable Court.[5]

As applied to him, the Petitioner contends that the Circuit Court of Appeals for the Ninth Circuit completely ignored this contention, but by necessary intendment[6] decided contrary to the decisions of this Court,[7] and in conflict with the decision of the Circuit Court of Appeals, Second Circuit.[8]

(b) This Petition brings to this tribunal for determination the question whether the matters set forth in the

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[4]*Ray v. United States,* 114 Fed. (2d) 508.

[5]*Nordone v. United States,* 302 U. S. 379, 383, 58 S. Ct. 275, 277, 82 L. Ed. 314; *Nordone v. United States,* 308 U. S. 338; *Weiss v. United States,* 308 U. S. 321; *United States v. Palakoff et al.,* 112 Fed. (2d) 888, 889.

[6]Footnote 2 under Summary Statement of Matters Involved, *ante.*

[7]*Nordone v. United States, supra.*

[8]*United States v. Palakoff, supra.*

Indictment [R. pp. 1 to 3] comply with the Constitutional Amendmetns 5 and 6 respecting the form and substance of the accusation against your Petitioner, whose Demurrer thereto was overruled. [R. pp. 4 and 6.]

The Indictment in the instant case is manifestly insufficient on authority of *Boykin v. United States,* 11 Fed. (2d) 484, and *Fontana v. United States,* 262 Fed. 283.

The position of the United States Circuit Court of Appeals for the Ninth Circuit is in sharp conflict with the holdings of other Circuit Courts of Appeals on this question, as is reflected in the Table of Circuits showing the split decisions, set forth in the footnote below.[9] Such conflict calls for clarification and authoritative determination by this Court.

(c) This Petition brings to this tribunal for determination a clarification of the jurisdiction of trial courts of the United States to carve out of a single offense,[10] two causes upon which double punishment has been imposed on your

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[9]Table of Circuits, showing split in decisions:

For Petitioner	*Circuit*	*Against Petitioner*	*Circuit*
Skelly v. U. S., 37 Fed. (2d) 503 ('30)	10th Cir.	*Rosenberg v. U. S.*, 13 Fed. (2) 369 ('26)	9th Cir.
Fontana v. U. S., 262 Fed. 283 ('19)	8th Cir.	*Yip Wah v. U. S.*, 8 Fed. (2d) 478 ('25)	9th Cir.
Lynch v. U. S., 10 Fed. (2d) 947 ('25)	8th Cir.	*Wong Ling Sing v. U. S.*, 3 Fed. (2d) 780, C. C. A. 1925	9th Cir.
Jarl v. U. S., 19 Fed. (2d) 901 ('27)	8th Cir.	*Wong v. U. S.*, 3 Fed. (2d) 780 ('25)	9th Cir.
Partson v. U. S., 20 Fed. (2d) 127 ('27)	8th Cir.	*Parmagin v. U. S.*, 42 Fed. (2d) 721 (Cal., 1930)	9th Cir.
Turk v. U. S., 20 Fed. (2d) 129 ('27)	8th Cir.	*Fiddelke v. U. S.*, 47 Fed. 275 (Cal., 1931	9th Cir.
Boykin v. U. S., 11 Fed. (2d) 484 ('26)	5th Cir.		
Bratton v. U. S., 73 Fed. (2d) 795 ('34)	10th Cir.		

[10]Title 26, U. S. C. A., Sec. 2553(a); Title 21, U. S. C. A., Sec. 174.

Petitioner. The decision sought to be reviewed by this Court is in conflict with the decisions of other Circuit Courts of Appeals.[11] Such conflict calls for clarification and authoritative determination by this Court.

The judgments imposed on Petitioner herein are violative of Articles V, XIII and XIV of the Constitution of the United States.

(d) This Petition raises the important question of federal constitutional law, involving the right of counsel, after the court has permitted prejudicial error, to waive the error to the prejudice of his client, especially in the absence of the express consent of the accused.

In the case of your Petitioner, the Government's counsel was cited for misconduct and the trial court declared that the matter was so prejudicial that there was nothing to do but declare a mistrial. Trial counsel thereupon withdrew the assignment, Petitioner not consenting, and the trial thereupon proceeded.

Extensive research has revealed a single decision on this point, to-wit, the case of *United States v. Newman,* 25 Fed. (2d) 357, the District Court opinion holding that when the court has permitted prejudicial error, counsel cannot waive the error to the prejudice of his client. The opinion sought to be reviewed holds: "Appellant, having brought about this result, cannot be heard to complain of it." As applied to him, Petitioner contends that, he personally having failed to consent to this waiver, the doctrine enunciated in the District Court case, *United States v. Newman, supra,* is a correct statement of the law, and that this Court should make its verification of this constitutional right.

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[11] *Copperwaithe v. U. S.,* 37 Fed. (2d) 846; *Ballerina v. Aderholt,* 44 Fed. (2d) 352.

Brief Statement of the Facts.

Petitioner was arrested by three officers in Los Angeles, on Saturday, the 23rd day of January, 1937, and was jailed and booked "on suspicion" of narcotics, robbery and extortion. [R. pp. 147 and 174.]

Petitioner remained in jail for three days and was thereupon released. Petitioner was never proceeded against on any of the said charges; there was not a word of testimony every adduced upon which the two last described charges were founded. However, on the 12th day of April, *1939*, while he was engaged in behalf of a Civic Committee, investigating activities of the local Los Angeles County District Attorney, he was re-arrested on the asserted narcotic's charge incident aforementioned, of January 23, 1937. [R. p. 174.]

On the 11th day of April, 1939, one of the three aforementioned officers was suddenly called before the Grand Jury by the District Attorney. Albeit none of the officers involved had taken any action in the interim subsequent to Petitioner's release after his arrest on the 23rd day of January, 1937. [R. p. 91; pp. 133-134; pp. 114-116.]

An Indictment was returned April 12th, 1939, and the case continued from time to time but ultimately set for the 11th day of September, 1939, the proceedings being contrary to the express provisos of the Penal Code of the State of California.[12]

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[12]Section 1050, Penal Code, State of California, provides that all criminal cases be set for trial not later than thirty days after the date of the entry of the plea of the defendant.

Section 1382, Penal Code, provides when a person has been held to answer for a public offense and an information is not filed against him within fifteen days thereafter, or if defendant whose trial has not been postponed upon his application, has not been brought to trial within sixty days after finding of the indictment, it should be dismissed.

On the 30th day of August, 1939, pending said trial, a federal officer named George Gyllenhammer arrested Petitioner on an Indictment similar in nomenclature to that set forth in the Record, page 1, charging violation of Title 21, U. S. C. A., Section 174, Count 1, and on Count 2, violation of Section 2553 (a), Internal Revenue Code. For some unexplained reason, said Indictment incorporated certain aliases as a supplement to the true name of Petitioner. His arraignment was set for September 11, 1939, the date set for the trial in the Superior Court of Los Angeles County, on which occasion the local District Attorney dismissed the action.

The Government counsel confessed statements in the said Indictment were prejudicial and procured the re-Indictment set forth in the Record, page 1, on September 20, 1939.

It may not be amiss to herein indicate that preceding these incidents, the Deputy District Attorney of Los Angeles County assigned to try the case resigned from that office on the 11th day of August, 1939, because he did not choose to try the case. [R. p. 181, *et seq.*]

Although Petitioner had been arrested for the asserted possesion of Government's Exhibit No. 1, on the 23rd day of January, 1937, no attempt to analyze the contents of the alleged contraband contained in said Exhibit No. 1 had ever been made by the local authorities until (?) the date that Petitioner was indicted as herein alleged, on the 12th day of April, 1939. [R. p. 149, *et seq.*] The Exhibit

was not turned over to the Government until after the Indictment of your Petitioner, on the 30th day of August, 1939, as hereinbefore alleged. [R. p. 48.] In fact the Government made no analysis until the 5th day of September, 1939 (after indictment). [R. p. 58.]

Petitioner submits that all of the officers involved admitted that it was customary to destroy evidence of this character within one year after arrest [R. p. 98], and the evidence reflects that actual instructions to destroy this Exhibit had been received on March 28, 1939, some weeks prior to the re-arrest, and some five months prior to the first Indictment upon which Petitioner was brought to trial in the District Court of the United States, in and for the Southern District of California, Central Division.

The evidence relied upon by the Government was the testimony of the three officers heretofore referred to, who testified that two of them reported for duty on the 23rd day of January, 1937, at 8:00 o'clock a. m., and would normally have ceased their duties at 5:00 o'clock p. m., and entered an apartment without process, occupied by two young ladies whom they had never seen before at about 11:00 o'clock a. m. on said 23rd day of January, 1937, and remained in said apartment until 7:00 o'clock p. m. [R. pp. 49, 88, 91, 138.]

The officers all admitted that they had never seen Petitioner prior to 9:00 o'clock p. m. that night; had never talked to him over the telephone, or otherwise. [R. pp. 52-53.] The principal of these three officers, one Ray-

mond W. Clarke, testified that he induced one of the young ladies occupying said apartment, to-wit, Betty Angel, to telephone your Petitioner and by listening in assertedly overheard the conversation between the said Betty Angel and your Petitioner, and a subsequent return call by your Petitioner to the said Betty Angel [R. pp. 55-58] and, as a result of intercepting said phone conversation, that said Officer Clarke staked out some ninety feet in a dark street, across the street from the building, and there assertedly saw Petitioner drive up, approach an archway in the premises, drive away and later return and that, after Petitioner had been arrested, in his absence and in the absence of any other person, the said Clarke claims that he found at a step near the archway Government's Exhibit No. 1. [R. pp. 70-75.]

Petitioner denied the conversations reputed to him by the interceptor, Officer Clarke. None of the two women occupants of the apartment were called as witnesses at the trial, although the Government did subpoena one, and had her available in court. [R. p. 7 *et seq.;* R. p. 79.]

The alleged intercepted phone conversations pertained to "white stuff" and "black stuff". No evidence whatsoever was offered at the trial as to the alleged significance of either "black stuff" or "white stuff". There was no testimony that Petitioner was ever seen in possession or control of Government's Exhibit No. 1.

In the early stages of the trial Government's Counsel, in the questioning of Officer Raymond W. Clarke, admitted that with knowledge of the expected answer, he elicited from said officer an alleged conversation with your Petitioner in 1937, whereby said officer in his testimony reflected an alleged proposed bribery of police officers by

your petitioner and extortion of several women. Assignment for misconduct of Government's Counsel was allowed, and the trial court declared in unequivocal terms that there was nothing to do but declare a mistrial. Trial Counsel for the Petitioner withdrew the assignment, and requested an admonition to the jury to disregard the incident, in which waiver Petitioner personally did not acquiesce. These incidents are set out in the record, pp. 81 to 88.

The opinion of the Circuit Court of Appeals [R. pp. 284 to 288] recites that the said question "was not objected to . . . and that Appellant having brought about this result cannot be heard to complain about it . . ."[13]

At the conclusion of the Government's case, motion for directed verdict was denied and excepted to. [R. p. 169.] The Government thereupon reopened its case upon leave of court [R. p. 169], and admitted Government's Exhibit No. 1 (the contraband referred to in the indictment) over objection and exception of Petitioner. [R. p. 170.]

The Government's Counsel, during the closing argument, proceeded to vociferously argue to the jury that Petitioner was guilty of corrupting local authority, reiterated the prejudicial matter which the trial court had already indicated called for a mistrial, and transcended any legitimate bounds of argument countenanced by any of the decisions reviewed by this Court. [R. pp. 195-203.]

The case was submitted to the jury at 2:38 o'clock p. m.; at 10:30 o'clock p. m. the court reconvened and re-

[13]The record, pp. 80, 82 and 83, shows continuous objections to said prejudicial matter.

instructed the jury at their request; at 12:02 o'clock a. m. the court, addressing the jury, stated: "Let us find out what each man on the jury thinks about the possibilities of arriving at a verdict." Several of the jurors answered "No"; some thought they could, they should; others said "Possibly", whereupon the jury retired and returned at 12:40 o'clock a. m. with the verdicts. [R. pp. 232-234.]

The trial court had refused Counsel's request to instruct the jury after they returned for further instructions, respecting their duty to perform their deliberations honestly and conscientiously, and not to surrender their honest convictions for the sake of arriving at a verdict; and to also instruct the jury on the law respecting proof, namely, that one witness whose testimony is entitled to credence is sufficient to overcome testimony of several witnesses. [R. pp. 228-229.] The court, however, declined to give such instructions, nor were these instructions given at all.

Sentences imposed and the action of the trial court after the verdict are set forth in the Jurisdictional Statement, *supra*.

Specifications of Error Relied On.

The Specifications of Error relied on in the appeal taken to the Circuit Court of Appeal [R. pp. 241-268] are respectfully called to the attention of this Honorable Court.

What the Petitioner requests the Court to consider here is not a question of the sufficiency of the evidence, but whether the Petitioner received the kind of trial guaranteed under the laws of the United States. It was held in *Barr v. United States*, 9 Fed. (2d) 820, that an accused could not be required to waive his right of appeal.

In the case of this Petitioner, the Circuit Court of Appeals has departed from the accepted and judicial course of procedure, virtually arbitrarily refusing to consider the points on appeal.

It is the contention of the Petitioner that the Court should have instructed as requested in Brief Statement of Facts, *infra,* supported by authority,[14] and should have not made the inquiry of the jury in the manner set forth in the Statement.[15]

The Circuit Court Opinion sought to be reviewed cites its previous opinion, *Waggoner v. United States* 113 Fed. (2d) 867, 868, which opinion in effect holds there is no such thing as misconduct of Government's Counsel.

Under the exercise of this Court's power of supervision, in the light of its previous pronouncements,[16] the Circuit Court should be advised that the plain error should be noticed, even in the absence of assignment.

Dated: At Los Angeles, California, this 20th day of November, 1940.

JAMES UTLEY, *Petitioner.*

By JOHN F. SHEFFIELD,
Counsel for Petitioner.

A. BRIGHAM ROSE,
Of Counsel.

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[14]*Berger v. United States,* 62 Fed. (2d) 438, at p. 440.

[15]Brief Statement of Facts, *supra. Brasfield v. United States,* 272 U. S. 448, 450, 71 L. Ed. 345.

[16]*United States v. White,* 77 Fed. (2d) 757; *United States v. Atkinson,* 297 U. S. 157; *Newman v. United States,* 224 Fed. 95; *Berger v. United States,* 295 U. S. 78; *Pharr v. United States,* 488 Fed. (2d) 757.